Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board	)	CC Docket No. 96-45
On Universal Service	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
	)	WC Docket No. 06-122
To: The Commission	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION OF MARTHA SELF

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PETITION FOR RECONSIDERATION AND CLARIFICATION OF MARTHA SELF

Pursuant to Section 1.429(d) of the Commission's rules, 47 C.F.R. §1.429(d), Martha Self ("Self") seeks reconsideration and clarification of the Commission's Order on Reconsideration in CC Docket 96-45 denying BellSouth Corporation's ("BellSouth") Petition for Reconsideration and Clarification with respect to the Fifth Circuit remand order denying BellSouth's request for refund of universal service contributions remitted from January 1, 1998 to October 31, 1999 based on the holding of the Fifth Circuit Court of Appeal's in *Texas Office of Public Utility Counsel v. FCC,* (hereinafter "TOPUC").[1]

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[1]Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Sixteenth Order on Reconsideration in CC Docket No. 96-45, Eighth Report and Order in CC Docket 96-45, Sixth Report and Order in CC Docket No. 96-262, FCC 99-290 (Rel. Oct. 8, 1999), 64 Fed. Reg. 60,349 (Nov. 5, 1999) ("Remand Order"); Order on Reconsideration in CC Docket No. 96-45 (rel. April 11, 2008); see Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999) ("TOPUC").

SUMMARY

In the Commission's Order on Reconsideration of BellSouth's Petition for Reconsideration, the Commission denied BellSouth's request for refund of Universal Service Fund (hereinafter "USF") contributions remitted from January 1, 1998 to October 31, 1999 that were based on intrastate revenues deciding that the Fifth Circuit's decision in TOPUC applied prospectively only.[2] The Commission also reconfirmed that Commercial Mobile Radio Services (hereinafter "CMRS") providers may recover their USF contributions through rates charged for all of their services.[3]

Self is the plaintiff in a class action suit pending against BellSouth Mobility (hereinafter "BSM") in the United States District Court for the Northern District of Alabama.[4] Part of the relief requested by Self is that BSM refund to Self and other BSM customers that amount of USF contributions obtained by BSM between January 1, 1998 to October 31, 1999 that were based on intrastate telecommunications revenues. Self also alleges that BSM's recovery of USF contributions was not done in an equitable manner as required by Commission order, because certain groups of customers bore a disproportionate amount of USFcontributions due to BSM

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[2]Order on Reconsideration, ¶21.

[3]Reconsideration Order, ¶¶8-9.

[4]Martha Self v. BellSouth Mobility, LLC, CV-98-JEO-2581-S (Removed October 9, 1998).

USF charges on customer bills that had no relationship to the customer's interstate calling or the amount of interstate telecommunications revenues[5]

Based in part on the Commission's Order on Reconsideration of BellSouth's petition, the District Court issued an Order and Memorandum opinion on April 21, 2008 holding that, because the Commission determined that TOPUC applied prospectively and that CMRS may recover USF contributions through rates charged for all of their services, Self's claims conflict with the Commission's Reconsideration Order and are either preempted by the order or the order precludes jurisdiction of the District Court. [6] In light of the District Court's reliance on the Commission's Order on Reconsideration, Self seeks reconsideration and clarification of the Commision's Order on Reconsideration.

Self requests the Commission to reconsider its decision to apply TOPUC prospectively. The Commission's determination is contrary to controlling United States Supreme Court precedent that requires that the Fifth Circuit's determination that the Commission was without authority to base USF contributions on intrastate revenues would mandate that the Commission apply TOPUC retroactively.

Self also requests the Commission to clarify that, in the event that it affirms its previous decision to apply TOPUC prospectively to BellSouth's request for refund of USF payments made to USAC, that the Commission's Order on Reconsideration does not apply prospectively to actions pending by customers of CMRS providers when TOPUC was decided to recover amounts CMRS providers collected for USF contributions that were calculated on intrastate revenues.

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[5]*See* 13 F.C.C.R. 5317, ¶829 (1997).

[6]Order and memorandum opinion N.D. Ala. in 2:98-CV-02581-JEO (April 21, 2008).

Also. Self requests the Commission to reconsider its reaffirmation that CMRS carriers may recover USF contributions through rates charged for all of its services during the period from January 1, 1998 through October 31, 1999 in light of the Fifth Circuit's decision in TOPUS that the Commission has no authority under §254 of the FCA or any other basis to assert jurisdiction over intrastate revenues.[7]

Last, Self requests the Commission to clarify that, prior to the adoption of specific USF recovery rules for CMRS providers in 2002[8] and 2003[9], CMRS carriers' USF recovery practices, either through rates or through separate line items expressed as a flat amount or percentage, were governed by the Commission rule that carriers could not shift more than an equitable share of their contributions to any customer or group of customers and that the 2002 and 2003 recovery rules do not apply retroactively to CMRS providers recovery practices occurring prior to the time of their adoption.[10]

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[7]*See* 183 F.3d at 448.

[8]Federal-State Joint Board on Universal Service Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 17 FCC, Rcd 24952, et seq. (2002).

[9]Federal-State Joint Board on Universal Service Order and Order on Reconsideration, CC Docket No. 96-45, 18 FCC Rcd 1421, et seq. (2003).

[10]Federal-State Joint Board on Universal Service Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, ¶829 (1997).

BACKGROUND

The Commission originally adopted rules governing the calculation of assessments and carrier recovery of USF contributions in May, 1997.[11] The Commission required telecommunications carriers to contribute to the federal USF support mechanism for schools, libraries, and rural health providers, with carrier contribution amounts calculated based on the carrier's combined interstate, intrastate, and international end-user telecommunications revenues.[12]

Martha Self has been a wireless customer of BSM and its successors since prior to January, 1998. In September, 1998 Martha Self sued BSM in Alabama requesting, in part, that BSM refund to Self and other BSM customers the amount of money obtained from customers by BSM for USF contributions that were calculated based on BSM's intrastate revenues because the assessment of intrastate revenue for USF contributions was unlawful as being beyond the jurisdiction of the Commission.[13]

Self also contended that BSM shifted more than an equitable share of its USF contributions to a certain group of its customers because the flat rate per line USF charges on Self and other customers' bills had no relationship to the customers interstate calling usage which

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[11] *Id.* at pages 9189-9205, ¶¶806-841 (1997).

[12] *See* 47 C.F.R. §§54.706(b), (c) (1998).

[13] *See* Complaint attached hereto as Exhibit "A."

resulted in low-interstate calling customers bearing a disproportionate share of BSM's USF contributions.[14]

In 1999, while Self's suit was pending, the Fifth Circuit Court of Appeals in TOPUC held that the Commission exceeded its jurisdiction under Section 2(b) of the Federal Communications Act (FCA) by including intrastate revenues in the contribution base for calculating USF contributions to the schools, libraries, and rural health care support programs and ordered the Commission to implement its order reversing the Commission's decision to include intrastate revenues in the contribution base.[15]

The Commission eliminated intrastate revenues from the contribution base for calculating carrier USF contributions to the USF school, libraries, and rural health care support mechanisms starting November 1, 1999.[16]

Following the TOPUC decision, only a few carriers requested refunds of USF contributions. On November 10, 1999, PanAm Wireless, Inc. (hereinafter "PanAm") filed a petition requesting a refund of USF contributions assessed by USAC on intrastate revenues because USAC was without jurisdiction to include intrastate revenues in the contribution base calculation.[17]

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[14]*Id.*

[15]183 F.3d at 447-48.

[16]Federal-State Joint Board on Universal Service, Sixteenth Order on Reconsideration, CC Docket No. 96-45, 15 FCC Rcd 1679 (1999) ("Fifth Circuit Remand Order").

[17]PanAm Wireless, Inc. Request for Refund of Intrastate Universal Service Contributions, CC Docket No. 96-45 (Nov. 10, 1999).

On December 6, 1999, BellSouth filed a Petition for Reconsideration and Clarification of the Commission's Fifth Circuit Remand Order requesting that the Remand Order apply retroactively based on controlling legal authority and requested a refund of USF contributions paid that were calculated on intrastate revenues in the event the Commission applied TOPUC retroactively.[18] BellSouth also sought reaffirmation by the Commission that CMRS carriers may recover the costs of USF contributions through rates charged for all of its services.[19]

In the 1997 Universal Service Order, the Commission permitted, but did not require, CMRS carriers to recover USF contributions from its customers.[20] The Commission determined however, that if carriers decided to recover contribution costs from their customers, carriers could not shift more than an equitable share of their contribution costs to any customer or group of customers.[21] These rules regarding carrier recovery governed carrier USF cost recovery practices until 2002.

Based on the Commission's concern that CMRS carriers were shifting a disproportionate share of the cost of USF contributions to certain customer classes and to insure that contribution recovery be done in a reasonable and fair manner, the Commission in 2002, for the first time, adopted specific rules for carrier contribution recovery practices to help prevent consumers from

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[18]BellSouth Corporation's Petition for Reconsideration and Clarification, CC Docket No. 96-45, Dec. 6, 1999.

[19]*Id.* at p. 2.

[20]*See*, 15 F.C. CR 12, 050 ¶11 (2000); 17 F.C.C.R. 3752 n. 10 (2002).

[21]Federal-State Board on Universal Service, Report and Order, CC Docket No. 96-45, 12 F.C.C. Rcd. 8776 ¶829 (1997).

being charged excessive universal fees.[22] The Commission implemented cost recovery rules effective April 1, 2003 which included preventing carriers that choose to recover USF contributions as a flat amount line-item from collecting from any customer an amount exceeding the interstate telecommunication portion of the bill times the applicable contribution factor.[23] The Commission attempted to insure that the amount of USF contributions recovered from customers bear a rational relationship to the interstate telecommunications portion of each customer's bill.[24]

In 1997, the Commission allowed CMRS carriers to recover USF contributions through rates on all CMRS services to avoid providing a competitive advantage to carriers that provided mostly interstate service.[25] In its 2008 order, the Commission reconfirmed that CMRS providers may recover their USF contributions through rates charged for all of these services and that the decision in TOPUC did not alter this prior decision.[26]

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[22]Federal-State Joint Board on Universal Service Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 17 FCC Rcd. 24952, 24974-80, paras. 40-55 (2002).

[23]*Id.* at ¶51; Order and Order on Reconsideration, CC Docket No. 96-45, 18 FCC Rcd. 1421, 1425 ¶8.

[24]*Id.* 18 F.C.C. Rcd. 1421, 1425 ¶8.

[25]Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration and Report and Order, CC Docket No. 96-45, 13 F.C.C. Recd. 5318, 5489 para. 309 (1997) ("Fourth Reconsideration Order").

[26]Order on Reconsideration, CC Docket 96-45, ¶8 (2008).

The Commission also denied BellSouth's request to apply the Commissions' Fifth Circuit Remand Order on a Retroactive Basis and denied its request for a refund of USF contributions that were derived from assessments calculated on intrastate revenues.[27]

Both Self and BellSouth had motions for summary judgment pending before the District Court in the Northern District of Alabama in the Self litigation when the Commission's 2008 order was released on April 11, 2008. Based in part on the Commission's order, the District Court made certain rulings on the pending motions adverse to Self and many other customers of BSM. Self believes that the District Court's adverse rulings were incorrect. However, because Self has been adversely affected by the Court's reliance on the Commission's Reconsideration Order, Self seeks reconsideration and clarification of the Commission's order.

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[27] *Id.* at ¶13.

DISCUSSION

I. RETROACTIVE APPLICATION OF TOPUC GENERALLY.

Self asserts that BellSouth was correct in its position before the Commission that the Fifth Circuit's decisions in TOPUC must be applied retroactively based on the U.S. Supreme Court's decisions in *James B. Bean Distilling Co. v. Georgia; Harper v. Virginia Dept. of Taxation,* and *Reynoldsville Casket Co. v. Hyde,* as well as the other authorities cited by BellSouth in its Petition for Reconsideration and Clarification.[28]

The Commission erroneously concluded that these authorities do not mandate retroactive application of TOPUC because the Fifth Circuit did not apply the new rule to the litigants before it and neither plaintiff in TOPUC requested a refund of USF contributions from the Commission.[29]

The Fifth Circuit did apply its ruling in TOPUC to the litigants before it--Cincinnati Bell, COMSAT and, most importantly, the Federal Communications Commission. The TOPUC plaintiffs asserted that the Commission exceeded its jurisdictional authority by assessing USF contributions on intrastate revenues and the Fifth Circuit agreed. Obviously, the Court applied its holding to the parties before it by deciding the issue in controversy in favor of the plaintiffs and ordering the defendant Commission to implement its ruling. To conclude otherwise would

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[28]Petition for Reconsideration and Clarification of BellSouth Corporation, pps. 7-13.

[29]Order on Reconsideration, ¶21.

result in the Court's decision being nothing more than an advisory opinion which courts are constitutionally precluded from rendering.[30]

. The Commission concluded that since the Fifth Circuit did not specifically articulate that TOPUC applied retroactively it should be prospective only. It was not necessary for the Fifth Circuit to specifically mandate that its decision apply to the litigants before it because it, in fact, applied its decision to the parties before it. In civil cases where the court does not reserve the question whether its holding should be applied to the parties before it, the opinion has retroactive application and every court as well as administrative agencies are required to give the decision retroactive effect and this extends to other litigants whose cases were not final at the time of the ruling.[31] Under *Harper*, a remedy other than retroactive application can only be awarded in four very specific circumstances, none of which apply here.[32]

The fact that neither BellSouth nor COMSAT sought a refund before the Fifth Circuit or the Commission has no effect on whether the holding of TOPUC applies retroactively. Plaintiffs sought declaratory relief that the Commission exceeded its jurisdiction. Therefore, the Fifth Circuit's ruling favorable to the plaintiffs must be applied to the parties and others with

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[30]United States Constitution, Art. III. *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1997) (the prohibition against advisory opinions insures that every case of first impression has a retoractive effect). The prohibition of advisory opinions applies regardless whether the relief sought is monetary, injunctive or declaratory. An opinion is not advisory where there is an actual dispute between litigants and a court's decision will have some effect on the dispute. *See, Calderon v. Ashmus,* 523 U.S. 740 (1998).

[31]*Harper v. Vir. Dept. of Taxation,* 509 U.S. 96 (1993); *SEC v. Chenery Corp.,* 332 U.S. 194, 203 (1997); and *National Fuel Gas Supply Corp. v. FERC,* 59 F.3d 1281, 1289 (D.C. Cir. 1995).

[32]*See National Fuel, supra,* at pp. 1288-89.

similar pending claims regardless that the nature of the relief sought differed or that plaintiffs did not request monetary refunds.

The legal obligation to apply a court's decision retroactively to the parties and other litigants with pending actions when the decision was decided prevails over any equitable claims under Chevron Oil analysis.[33] Therefore, the Commission incorrectly assessed the equities of affected parties to conclude the TOPUC applies prospectively.

Agency rules that are inacted contrary to legal requirements or beyond the scope of agency authority have no force or effect of law and are void *ab initio.*[34] Since TOPUC held the Commission had no jurisdiction to assess intrastate revenues, the agency action was void *ab initio* and, therefore, the effect of the TOPUC decision was retroactive to the time the rule was initiated.

Even if consideration of the equities of retroactive application were appropriate, the injustice perceived by the Commission does not exist. Only a handful of carriers timely requested refunds from the Commission by requesting reconsideration of the Commission Remand Order. Requests by other carriers at this late date would be untimely under Commission rules. Therefore, as a practical matter, retroactive application of TOPUC would have little economic or operational impact on the USF program.

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[33]*Harper, supra, at 96; National Fuel, supra.*

[34]*See Chrysler Corp. v. Brown,* 441 U.S. 281 (1979); *Dixon v. U.S.*, 381 U.S. 68, 74 (1965).

Retroactive application of TOPUC would apply to the parties in TOPUC and to other litigants whose cases were not final when TOPUC was decided.[35] Since no additional carriers requested refunds prior to TOPUC, no carrier would be entitled to monetary refunds if TOPUC was retroactively applied. Any attempt to seek relief in the courts now would be barred by applicable statute of limitations.

II. RETROACTIVE APPLICATION OF TOPUC AS TO SELF'S CLAIM FOR REFUND

Self requests that the Commission clarify that, as to consumer claims against carriers to recover USF contribution amounts assessed on intrastate revenues that were pending when TOPUC was decided, TOPUC has retroactive application.[36] Self's action was filed prior to and was pending when TOPUC was decided and asserted the same grounds for relief as the plaintiffs in TOPUC. Therefore, under *Beam, Harper,* and *Hyde,* TOPUC must be given retroactive effect as to Self's claims.

Also, because Self's claims were pending when TOPUC was decided, *Beam, Harper,* and *Hyde* would require retroactive application of TOPUS to Self without consideration of any equitable issues.

Even if the Commission employed an equitable analysis to Self's claims, retroactivity would not produce a manifest injustice with regard to the administration of the USF program. Self's claims are against a single wireless carrier (BSM) and pertain to the period between

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[35] *Harper, supra,* 509 U.S. at 96 (1993).

[36] To Self's knowledge, her claims for recovery of USF contributions was the only consumer claim pending when TOPUC was decided.

January 1, 1998 and October 31, 1999. No other similar actions are pending and no new actions could now be maintained due to expiration of applicable limitation periods.

Retroactive application of TOPUC to Self would have no effect on USAC. Self seeks recovery of excess amounts of USF contribution recovered by BSM from BSM's customers. A refund by BSM to its customers would not require a corresponding refund to BSM by USAC or an increase in the USF contribution factor. The Commission's concerns raised in the Order on Reconsideration regarding the impact of USF refunds on current consumers and USAC are inapplicable here.

BSM recovered more money from Self and other customers for USF contributions than it was entitled to recover. BSM has received a good portion of this money back through payments from USAC under the USF program. BSM has received a substantial windfall by not shouldering the burden of absorbing the consequences of voluntarily recovering money that it was not entitled to recover which would result in BSM's customers paying for BSM's error.

III. THE RECOVERY OF USF CONTRIBUTIONS THROUGH RATES FROM ALL OF ITS SERVICES

Self requests the Commission to reconsider its determination that CMRS providers could recover USF contributions through rates for all of its services during the period from January 1, 1998 through October 31, 1999 or, in the alternative, clarify that permitting CMRS to recover USF contributions through rates for all of its services does not allow CMRS providers to recover USF contributions that were calculated on assessments based on intrastate revenue.[37] The Fifth

[37]Order on Reconsideration, ¶¶8-9.

Circuit held that neither Section 254 of the FCA nor any other jurisdictional basis existed to allow the FCC to assess USF contributions on intrastate revenues.[38] Although BSM and other CMRS providers could recover USF contributions from all sources of revenues, it could not recover more than the amount that was properly assessed. Since that portion of the USF assessment based on intrastate revenue was improper, regardless whether BSM recovered this portion of the assessment from intrastate or interstate rate revenues, BSM recovered more money for USF contributions than it was entitled to recover regardless of the revenue source from which the assessment was paid. By clarifying this issue as requested by Self would not otherwise affect the Commission's recovery practices for CMRS providers set out in the Fourth Order on Reconsideration.

In the alternative, Self requests the Commission to reconsider the Fourth Order in light of the TOPUC decision. If the FCC had no jurisdiction to assess intrastate revenues for USF contributions, the FCC had no jurisdictional basis to allow CMRS to recover these assessments during the time period at issue. Additionally, since the assessment would be void *ab initio* any Commission order allowing recovery of the assessment would be equally void and of no legal effect.

IV. PROSPECTIVE APPLICATION OF THE 2002, 2003 USF COST RECOVERY RULES

Self requests the Commission to clarify that the USF contribution cost recovery rules promulgated in 2002 and 2003 apply prospectively only. In its Order on Reconsideration, the Commission cited orders issued in 2002 and 2003 that allowed carriers to recover USF

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[38]*See* 183 F.3d @448.

contribution costs through separate line-items expressed as a flat amount or as a percentage and a 2005 Bureau order stating that the line-item on a customer bill does not have to reflect that particular subscriber's interstate useage.[39] Prior to these new rules, USF contribution practices were governed by the Commission's mandate that carriers not shift more than an equitable share of contributions to any customer or group of customers.[40] In its order on Reconsideration, the Commission noted that ordinarily a new rule should be given prospective effect.[41] There is no directive in any order cited by the Commission that those orders were retroactive and the Commission appears to have applied them prospectively in keeping with the general rule that agency rule making is prospective.[42] Self requests the Commission to clarify that the three orders relied upon in its Reconsideration Order apply prospectively only.

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[39]Reconsideration Order, ¶¶8 and 9; citing 17 F.C.C. Rcd. 24952, 24974, 24978-80, paras. 40, 53-55 92002), Fifth Circuit Clarification Order, 20 FCC Rcd. at 13782, para. 9 (2005). *See also,* Order and Order on Reconsideration 18 F.C.C. Rcd 1421 (2003).

[40]13 F.C.C. Rcd. 5317, ¶829 (1997).

[41]Order on Reconsideration, ¶14.

[42]*See MCI Telecom. Corp. v. F.C.C.,* 10 F3d 842 (D.C. Cir 1993).

CONCLUSION

For the reasons discussed above, the Commission should:

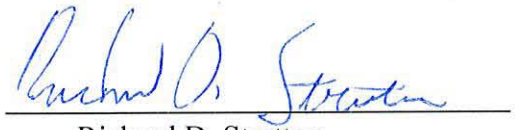
(1) Reconsider its decision to apply TOPUC prospectively or, in the alternative, clarify that the Order on Reconsideration regarding prospective application of TOPUC to carrier requests of refunds of USF contributions does not apply prospectively to claims made by customers of CMRS providers to recover amount CMRS providers collected for USF contributions calculated on intrastate revenues pending when TOPUC was decided;

(2) Reconsider its reaffirmation that CMRS carriers may recover USF contributions through rates charged for all of its services during the period from January 1, 1998 through October 31, 1999; and

(3) Clarify that, prior to the adoption of specific USF recovery rules for CMRS providers in 2002 and 2003, CMRS carriers' USF recovery practices, either through rates or through separate line items expressed as a flat amount or percentage, were govered by the Commission rule that carriers could not shift more than an equitable share of their contributions to any customer or group customers and that the 2002 and 2003 recovery rules do not apply retoractively.

Respectfully submitted,

MARTHA SELF



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I hereby certify that on this the 9th day of MAY, 2008, a copy of the foregoing document was served on the following by first-class mail:

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IN THE STATE OF ALABAMA DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARTHA SELF, an Individual,	*	
	*	
Plaintiff,	*	
	*	
v.	*	CIVIL ACTION NO:
	*	98-JEO-2581S
BELLSOUTH MOBILITY, INC., et al.,	*	
	*	
	*	
Defendants.	*	

PLAINTIFF'S AMENDED COMPLAINT

Comes now, Martha Self, on behalf of herself and as the representative of the class of persons or entities similarly situated, pursuant to Rule 23 of the Fed. R. Civ. P., and sues Cingular Wireless, LLC (hereinafter "Cingular"), BellSouth Cellular Corp. (hereinafter "BCC"), BellSouth Mobility, Inc. (hereinafter "BMI"), and American Cellular Communications Corporation (hereinafter "ACC"), and states the following:

I. NATURE OF THE ACTION

1. BCC, BMI, and ACC are or were corporations engaged in the providing of telecommunication services, including wireless cellular telephone service, to various regions of the United States. In approximately October, 2000, Cingular was formed as a joint venture of SBC Communications, Inc., and BellSouth Communications. As a result of the formation of Cingular, wireless cellular telephone service formerly provided by BCC, BMI, or their subsidiaries or affiliates, were taken over in whole or in part by the new joint venture entity.

EXHIBIT "A"

2. Pursuant to the 1996 Telecommunication Act, Congress mandated the creation of a fund to pay for the cost of providing certain telecommunication services to schools, libraries, rural health care facilities, and others. This fund is known as the "Federal Universal Service Fund" (hereinafter " FUSF"), and is financed through assessments to interstate telecommunication carriers known as Federal Universal Service Fund Assessments (hereinafter "FUSFA").

3. On January 1, 1998, and thereafter, defendants, through their operating cellular telecommunication entities, subsidiaries and affiliates, voluntarily "passed through" FUSFA to their customers and have collected monies from their cellular communication customers for amounts contributed by them to the FUSF. The assessments passed through to customers and monies collected from customers are based, in part, on pro-rata assessments to cellular telecommunication customers and include monies collected from customers based upon intrastate telephone usage of those customers.

4. The Federal Communications Commission (hereinafter "the FCC") was charged with promulgating regulations implementing the 1996 Telecommunication Act mandated by Congress. The FCC allowed cellular wireless carriers to decide for themselves whether and how much of the FUSFA to recover from customers and required that these entities not shift more than an equitable share of the carrier's contributions to any customer or group of customers, and further, to provide accurate, truthful, and complete information regarding the nature of the FUSF charge. The FCC further required that the recovery of contributions be done in an equitable and non-discriminatory fashion. The FUSFA were not federally mandated end user surcharges

and the collection from customers of assessments paid by carriers to the fund was not mandated by the FCC.

5. On July 30, 1999, the Fifth Circuit Court of Appeals issued the decision of *Texas Office of Public Utility Counsel v. Federal Communications Commission,* 183 F. 3d 393 (5th Cir. 1999). In that decision, the Fifth Circuit Court of Appeals held that the FCC exceeded its jurisdiction and authority by assessing intrastate revenues of interstate telecommunication providers for contributions to the FUSF.

6. Plaintiff in this action seeks on behalf of herself, and as the representative of a class of persons or entities similarly situated, among other relief, to recover on behalf of herself and the class members a reimbursement of or credit for monies collected by defendants from their cellular telecommunication customers that were wrongfully and unlawfully collected by defendants based on revenues generated from customers' intrastate telephone usage beginning on January 1, 1998; monies collected by defendants that exceeded the contribution assessment amount paid into to FUSF; monies collected from customers that constitute an inequitable and discriminatory share of defendants' contributions to the FUSF, and monies collected from customers not allowed by the contracts between defendants and the class members.

II. PARTIES

7. Martha Self is an adult resident citizen of the State of Alabama.

8. BCC, BMI, ACC, and Cingular are foreign corporations doing business in the State of Alabama.

III. FACTUAL ALLEGATIONS

9. Martha Self is a long-standing wireless cellular telephone owner and service user who, prior to January 1, 1998, contracted with BMI (now Cingular) for these entities to provide wireless telephone service.

10. In late January, 1998, Self was notified by BMI that starting with the January billing cycle, BMI was assessing and collecting a per-line Universal Service Support charge and further represented to Self in her January, 1998 bill that the Universal Service Support charge "supports Bell South's contribution to the Universal Service Fund, which BellSouth and other carriers are required to make by federal law." Beginning in January, 1998, and thereafter, defendants collected from plaintiff and others similarly situated a "Universal Service Charge" as a line item, flat rate charge added to the customers' bill. This charge and the collection thereof was based, in part, on revenue of defendants derived from intrastate telephone service.

11. BCC, BMI, ACC, and Cingular assessed and collected monies from its wireless telecommunication customers including Self and others similarly situated in the State of Alabama and elsewhere directly or through their subsidiaries, partners, affiliates, or joint venturers.

12. BCC, BMI, ACC, and Cingular directly, or through their subsidiaries, partners, affiliates, or joint venturers, wrongfully assessed and collected monies from Self and others similarly situated to reimburse them for amounts paid to the FUSF.

IV. CLASS ALLEGATIONS

13. In addition to bringing this action on her own behalf, plaintiff also brings this action as the representative of the class, defined as all persons or entities who are or were wireless telecommuniction customers of defendants whom BCC, BMI, ACC, and Cingular have for themselves, or on behalf of their subsidiaries, partners, affiliates, joint venturers, or other licensees wrongfully billed, collected, received, transmitted, or retained monies collected as a result of assessments for contributions to the FUSF.

14. **Numerosity [Fed. R. Civ. P. 23(a)(1)]**: The class is so numerous and so geographically disbursed that joinder of all members is impractical. On information and belief, plaintiff alleges that there are thousands of members of the class nationally.

15. **Commonality [Fed. R. Civ. P. 23(a)(2)]**: Common questions of law and fact exist as to all members of the class. These common questions include:

(a) whether defendants were allowed by federal law to assess, collect, receive, transmit, or retain money from plaintiff and the other class members as reimbursement of amounts assessed and paid as contributions to the Universal Service Fund based on revenue derived from plaintiff and other class members' intrastate cellular telephone usage or service;

(b) whether defendants illegally or wrongfully assessed, collected received, transmitted, retained, or used monies assessed and collected from plaintiff and other class members as reimbursement for amounts paid for contributions to the FUSF based on revenue derived from intrastate cellular telephone usage or service;

(c) whether defendants illegally or wrongfully assessed and collected from plaintiff and other class members amounts in excess of defendants' assessed contributions and allowable recoverable expenses incurred for assessments for the Universal Service Fund;

(d) whether defendants wrongfully charged and collected money from plaintiff and other class members not permitted by defendants' contracts with plaintiff and other class members;

(e) whether defendants wrongfully shifted more than an equitable share of their contribution to the FUSF to plaintiff and other class members;

(f) whether defendants made unjust and unreasonable charges or engaged in unjust, discriminatory, and unreasonable practices and classifications in assessing and collecting Universal Service Fund contributions in violation of 47 U.S.C. §201(b) and 202(a);

(g) whether defendants gave undue and unreasonable preference or advantage to particular persons or classes of persons in their assessment and collection of Universal Service Fund charages that was prejudicial and detrimental to plaintiff and the other class members in violation of 47 U.S.C. §202(a);

(h) whether defendants failed to provide accurate, truthful, and complete information to plaintiff and class members regarding the nature of the Universal Service Fund charge on its billing information in January, 1998;

(i) whether defendants breached their contracts with plaintiff and other class members by assessing and collecting Universal Service Fund charges prior to giving thirty (30) days advance written notice as required by the contracts;

(j) whether defendants breached their contracts with plaintiff and the class members by assessing, collecting, receiving, transmitting or retaining FUSF assessments based on revenues from intrastate wireless cellular telephone usage or service;

(k) whether defendants breached their contracts with plaintiff and other class members by assessing and collecting Universal Service Fund charges that were not permitted to be collected by the terms of the contracts;

(l) whether defendants wrongfully failed to credit or reimburse plaintiff and other class members for Universal Service Fund contributions assessed and collected from plaintiff and other class members;

(m) whether defendants wrongfully profited from the use of money collected from plaintiff and other class members for FUSF contribution assessments;

(n) whether defendants wrongfully failed to remit or credit to plaintiff and other class members profits derived from the use of FUSF contribution assessments collected from plaintiff and other class members;

(o) whether defendants negligently caused, allowed, or permitted plaintiff and the class members to be wrongfully charged money for reimbursement to them of their payment of FUSF contributions based on revenue derived from plaintiff and other class members' intrastate cellular telephone usage or service;

(p) whether defendants negligently caused, allowed, or permitted monies collected from plaintiff and other class members for their FUSF assessment not to be paid to the FUSF or remitted or credited to plaintiff and other class members;

(q) whether defendants received money to which they were not entitled, were unjustly enriched, or converted money from plaintiff and the class; and

(r) whether defendants are liable to plaintiff and the class for damages.

With regard to the subclass of all class members residing in the State of Alabama, additionally:

(s) Whether defendants engaged in fraud by representing to plaintiff and the class members that defendants were rightfully and legally entitled to assess, collect, receive, transmit, and retain FUSF charges based on intrastate cellular telephone usage or service; that amounts assessed for FUSF contributions to customers were equal to the amount that defendants were required to contribute to the FUSF; and that the amounts collected from customers for FUSF contributions were required to be collected by defendants by federal law, when defendants knew or should have known that the amounts charged were not required by federal law to be collected from customers, the amounts assessed and collected from customers was in excess of the amount of their FUSF contributions and that the amounts collected based on intrastate revenue was not permitted by law; and

(t) Whether defendants contrived, combined, federated, and conspired amongst themselves and their affiliates, partners, or subsidiaries to do the acts described above.

16. **Typicality [Fed. R. Civ. P. 23(a)(3)]**: The named plaintiff's claims are typical of the claims of absent class members.

17. **Adequacy of Representation [Fed. R. Civ. P. 23(a)(4)]**: The named plaintiff will fairly and adequately represent and protect the interest of the class. Plaintiff has no interests that are antagonistic to the absent class members. Plaintiff is represented by experienced and capable counsel which have previously litigated class action cases.

18. **Predominance [Fed. R. Civ. P. 23(b)(3)]**: Class certification is appropriate under Fed. R. Civ. P. 23(b)(3) because the common questions of law and fact referenced previously predominate over any questions affecting only individual members of the class. The only individual issue may be each class member's damages which, does not preclude certification. Defendants' actions in charging, collecting, receiving, transmitting and retaining FUSFA are the same with regard to each class member; thus, all class members can be uniformly treated.

19. **Superiority [Fed. R. Civ. P. 23(b)(3)]** : A class action is superior to other available methods for the fair and efficient adjudication of the controversy at issue herein. The interest of individual class members to control prosecution of the claims against defendants in separate actions are vastly outweighed by the interest of promoting judicial efficiency and the economies of time, effort, an expense. Separate actions by each of the thousands of class members would constitute a waste of time and resources for the class members and the Court. The management of this case as a class action will not be difficult. The only individual issues involved in this litigation are those concerning each class members' amount of damages. All liability issues are identical for every class member.

20. Inconsistent or varying adjudications [Fed. R. Civ. P. 23(b)(1)(A)]: The prosecution of separate actions by individual members of the class would create risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the parties opposing the class.

21. Injunctive and declaratory relief [Fed. R. Civ. P. 23(b)(2)]: Defendants have acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief and declaratory relief appropriate with respect to the class as a whole.

COUNT ONE

BREACH OF CONTRACT

(On Behalf of All Class Members)

22. Plaintiff, Martha Self, realleges and incorporates by reference the allegations of paragraphs 1 through 21, above, as if fully set out herein.

23. Plaintiff and class members entered into wireless cellular telephone service agreements with defendants.

24. Defendants breached the aforesaid contracts in one or more of the following respects:

(a) by assessing, collecting, receiving, transmitting, and retaining monies from plaintiff and class members for reimbursement of their FUSF assessments based on revenue derived from customers' intrastate cellular telephone usage or service;

(b) by assessing and collecting money for FUSF charges from plaintiff and class members prior to giving thirty (30) days advance written notice as required by the contracts;

(c) by assessing, collecting, and receiving monies from plaintiff and class members for contribution assessments of defendants to the FUSF that was not permitted to be collected by defendants from plaintiff and other class members pursuant to the terms of the contracts;

(d) by assessing and collecting the FUSF charge from plaintiff and other class members in an aggregate sum that was in excess of the amount of the defendants' contributions to the FUSF;

(e) by collecting monies from plaintiff and class members for expenses incurred in complying with the government FUSF assessments not permitted by the contracts;

(f) by collecting monies from plaintiff and other class members that were applied toward expenses incurred by defendants other than expenses associated with administering the FUSF contributions; and

(g) by earning and obtaining interest or other economic gain through use of funds collected from plaintiff and class members not permitted by the contracts.

25. As a direct result of defendants' breaches of the aforesaid contracts, plaintiff and class members have and will continue to suffer damages.

WHEREFORE, plaintiff and the class members demand judgment against all defendants, jointly and severally, and request compensatory and other damages as may be appropriate in this case, costs of these proceedings, attorneys' fees, and for

such further and additional relief as the Court deems to be just and proper under the circumstances of this matter.

COUNT TWO

VIOLATIONS OF THE FEDERAL COMMUNICATIONS ACT

(On Behalf of All Class Members)

26. Plaintiff, Martha Self, realleges and incorporates by reference the allegations of paragraphs 1 through 25, above, as if fully set out herein.

27. The aforesaid actions and activities of defendants constitute unjust and unreasonable charges, practices, and classifications in violation of 47 U.S.C. §201(b); unjust and unreasonable discrimination in charges, practices, classifications, and services to customers by charging inequitable amounts of Universal Service Fund charges through the use of a flat rate charge to plaintiff and other class members or by otherwise assessing charges on an inequitable basis in violation of 47 U.S.C. §202(a); the giving of undue or unreasonable preference or advantage to particular persons or class of persons through the imposition of Universal Service Fund charges to the detriment of plaintiff and the other class members in violation of 47 U.S.C.§202(a); violated policies mandated by the FCC that carriers not shift more than an equitable share of contributions to the Universal Service Fund to any customer or group of customers; and failing to provide adequate, truthful, and complete information regarding the nature of the Universal Service Fund charges to the detriment of plaintiff and other class members.

28. As a direct and proximate result of the violations of the Federal Communication Act and regulations promulgated thereto, plaintiff and other class members have been injured and damaged.

WHEREFORE, plaintiff and the class members demand judgment against all defendants, jointly and severally, for compensatory and other damages as may be appropriate in this case, costs of these proceedings, attorneys' fees, and for such further and additional relief as the Court deems to be just and proper under the circumstances of this matter.

COUNT THREE

UNJUST ENRICHMENT/MONEY HAD AND RECEIVED/CONVERSION

(On Behalf of All Class Members)

29. Plaintiff, Martha Self, realleges and incorporates by reference the allegations of paragraphs 1 through 28, above, as if fully set out herein.

30. Defendants have been unjustly enriched, received money to which they were not entitled, and converted personal property of plaintiff and other class members by:

(a) assessing and collecting money from plaintiff and other class members not permitted to be collected by federal law or the contracts between defendants and the class members;

(b) assessing and collecting monies from plaintiff and the other class members based on revenue derived from intrastate telecommunications of plaintiff and

other class members not allowed by federal law or the contracts between defendants and the class members;

(c) assessing and collecting monies from plaintiff and other class members to reimburse defendants for expenses and costs incurred in connection with their Universal Service Fund contributions not permitted by the contracts between defendants and the class members;

(d) assessing and collecting monies from plaintiff and the other class members in excess of the amounts assessed to defendants for contributions to the Universal Service Fund;

(e) assessing and collecting monies from plaintiff and the other class members for reimbursement for Universal Service Fund assessments from which defendants generated income which should be refunded or credited to plaintiff and the other class members;

(f) assessing and collecting monies from plaintiff and the other class members that was used to reimburse defendants for expenses incurred by them unrelated to defendants' administration of the Universal Service Fund program;

(g) assessing and collecting monies from plaintiff and the other class members for reimbursement of the Universal Service Fund assessments to defendants without providing 30 days advanced written notice; and

(h) assessing and collecting Universal Service Fund charges from plaintiff and the other class members in a manner that: shifted more than an equitable share of contributions to a group of customers; gave unreasonable preference or advantage to

particular classes of customers; and that constitute discriminatory practices and classifications to certain groups of customers.

31. Based upon the defendants' aforesaid actions and activities, they received monies that belong to plaintiff and the class members and are indebted to plaintiffs for all Universal Service Fund contributions collected from plantiff and other class members based upon assessments of intrastate revenues beginning January 1, 1998; all amounts collected by defendants as Universal Service Fund fees beginning January 1, 1998 that exceed the contribution amount paid to the Universal Service Fund; all amounts collected to reimburse defendants for expenses and costs incurred in connection with the Universal Service Fund contributions; all amounts defendants earned as a result of interest or other income from monies collected from plaintiff and the other class members for Universal Service Fund assessments which should properly be payable or credited to the class members; all monies collected from plantiff and the class members that were used to reimburse defendants for expenses incurred by them unrelated to defendants' administration of the Universal Service Fund program; all amounts collected from plaintiff and the class members in excess of the amounts assessed to defendants for their contribution and expenses associated with administering the Universal Service Fund program; a refund or credit to those customers of defendants that were obligated to pay an inequitable share of the contribution of defendants to the Universal Service Fund program; those customers that subsidized the unreasonable preference or advantage given by defendants to particular classes of their customers in connection with their assessment and collection of the Universal Service Fund charges and those customers that were adversely affected by

the discriminatory practices and classifications to certain groups of customers by defendants; and all amounts charged and collected from plaintiff and other class members in excess of the amount permitted to be collected by regulations of the FCC.

WHEREFORE, plaintiff and the class members demand equitable relief, including the disgorgement of monies obtained by defendants from plaintiff and the class members that have unjustly enriched them, constitute money had and received by them to which they were not entitled and which has been converted from the possession of plaintiffs in violation of their legal rights, and further demand judgment against all defendants, jointly and severally, for compensatory, punitive, and other damages as may be appropriate in this case, costs of these proceedings, attorneys' fees, and for such further and additional relief as the Court deems to be just and proper under the circumstances of this matter.

COUNT FOUR

MISREPRESENTATION AND SUPPRESSION

(On Behalf the Plaintiff, Individually, and

all Class Members Residing in the State of Alabama)

32. Plaintiff, Martha Self, realleges and incorporates by reference the allegations of paragraphs 1 through 31, above, as if fully set out herein.

33. Defendants made misrepresentations of material fact and failed to provide accurate truthful and complete information such that the information provided was misleading to plaintiff and the other class members through billing statement inserts and other means in January, 1998 and thereafter including, but not limited to:

(a) that the charges for the USF contributions by defendants set forth on the plaintiff and class members' bills were required by federal law;

(b) that amounts charged plaintiff and class members as a USF charge was to reimburse defendants for their "contribution" to the USF;

(c) that defendants were entitled to charge and collect all monies assessed and collected from plaintiff and the other class members as a USF charge; and

(d) that all monies collected from plaintiff and the other class members as a USF charge would be paid or was a result of payments made by defendants to the USF as contributions.

34. The aforesaid misrepresentations of material fact were made by defendants wilfully to deceive plaintiff and the class members, recklessly without knowing if the representations were true or not, or mistakenly.

35. Plaintiff and the other class members reasonably relied upon the misrepresentations of material fact by paying the amounts assessed and collected by defendants for the USF charge and in continuing their business relationship with defendants.

36. Defendants further supressed material facts which they were under a duty to disclose or communicate to plaintiff and the other class members including, but not limited to:

(a) that a portion of the USF charge reflected on customer bills was for expenses incurred by defendants in connection with administering the USF program;

(b) that the USF charge reflected on the customer bills was more than the defendants' contribution and expenses associated with administering the USF program;

(c) that a portion of the USF charge reflected on customer bills was to reimburse defendants for expenses unrelated to the administration of the USF program;

(d) that a portion of the USF charge reflected on customer bills was based upon customer revenues from intrastate revenue which defendants were not entitled to collect in connection with funding for the USF program; and

(e) that defendants derived additional revenue from the use of monies received pursuant to the USF charge reflected on the customers' bills which resulted in defendants receiving monies in excess of their contribution and expenses for the USF program.

37. All defendants fraudulently concealed from plaintiff and the class members that they were assessing and receiving monies from plaintiff and the class members pursuant to the USF charge reflected on the customer bills to which they were not entitled.

38. As a direct and proximate result of the aforesaid misrepresentations, suppressions, and concealment of material facts, plaintiff and the class members have been damaged including, but not limited to, paying USF charges to defendants which defendants were not entitled to collect.

WHEREFORE, plaintiff and the class members demand judgment against all defendants, jointly and severally, for compensatory, puntive, and other damages as may be appropriate in this case, costs of these proceedings, attorneys' fees, and for such further and additional relief as the Court deems to be just and proper under the circumstances of this matter.

COUNT FIVE

CONSPIRACY

(On Behalf the Plaintiff, Individually, and

all Class Members Residing in the State of Alabama)

39. Plaintiff, Martha Self, realleges and incorporates by reference the allegations of paragraphs 1 through 38, above, as if fully set out herein.

40. Defendants conspired among themselves and/or their subsidiaries, affiliates, partners, joint venturers, and FCC cellular telephone licensees to perform those acts and activities set forth above thereby proximately causing the plaintiff and other class members to be damaged as set forth above.

WHEREFORE, plaintiff and the class members demand judgment against all defendants, jointly and severally, for compensatory, puntive, and other damages as may be appropriate in this case, costs of these proceedings, attorneys' fees, and for such further and additional relief as the Court deems to be just and proper under the circumstances of this matter.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, on behalf of herself and all class members, pray for that relief requested above and:

1. Declaratory and injunctive relief including a declaration that the actions set forth above have and continue to be unlawful and for final injunctive relief prohibiting defendants from engaging in such actions in the future;

2. An order certifying the class and any appropriate subclasses thereof under Fed. R. Civ. P. 23(b)(1)(A) and/or 23(b)(2), or in the alternative under 23(b)(3).

3. For an order requiring the defendants to be financially responsible for notifying all class memers; and

4. For all equitable or other relief requeted or that the court may deem just and proper.

PLAINTIFF DEMANDS A TRIAL BY A STRUCK JURY.

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William W. Smith
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PLEASE SERVE DEFENDANT BY CERTIFIED MAIL; RETURN RECEIPT REQUESTED:

Cingular Wireless, LLC
c/o CSC Lawyers Incorporating SRV, Inc.
150 S. Perry Street
Montgomery, AL 36104

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document has been served upon all counsel of record in this cause by placing a copy of same in the United States Mail, postage prepaid and properly addressed this the 29 day of Oct, 2004.

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